United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 13, 2000

TO : Gary T. Kendellen, Regional Director

Region 22

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice 177-3987

530-4080-5030-4700

SUBJECT: Aero Ambulance Services, Inc. 530-4090-6000

Case 22-CA-23977 530-8081-6900

This Section 8(a)(5) case was submitted for advice as to whether the Employer lawfully refused to bargain with and withdrew recognition from the Union after the dissolution of the certified representative and the transfer of the unit employees into another local.

FACTS

On October 10, 1995, Teamsters Local 617 filed a petition for a unit of emergency medical technicians and passenger assistant technicians, hereinafter called the Unit. The Region conducted an election on December 8 and 9. Eleven votes were cast for, and 11 against, the Union. There were four challenged ballots, three of them the subject of a complaint issued on March 28, 1996. On February 17, 1999, the Board found, 327 NLRB No. 128, that two of the challenges were discriminatees whose ballots should be opened and counted. On March 18, 1999, the Region opened and counted the challenged ballots and certified Local 617 as the representative of the unit. Employer declined to bargain and instead petitioned the Court of Appeals for review of the Board's decision. On November 10, 1999, the Third Circuit denied the petition, 203 F.3d 816 (mem). By letter dated December 8, the Union's counsel requested bargaining, and by letter dated December 20, the Employer agreed to bargain. The parties met on February 9, 2000. Thereafter, Local 617 cancelled several proposed bargaining sessions.

In 1999, Local 617 had about 1100 members. In March 1999, the International put Local 617 under a trusteeship. The trustee appointed by the International was the Secretary-Treasurer of sister Local 701. In early 2000, the International trustee recommended that Local 617 be dissolved. On March 19, the trustee called a meeting of the general membership of Local 617, to discuss the trusteeship. The meeting notice did not tell members of possible dissolution or merger of their local. As Aero

unit employees were not considered members, they were not notified of the meeting.

About 500 members attended the meeting. The trustee told them that the International Union was likely to dissolve Local 617 and to divide its representees among five other locals. Most of the members present were employees of APA Trucking, a company unrelated to the Employer. Apparently unanimously, the APA employees expressed their wish, by means of a show of hands, that their new representative be Local 701. The trustee told them that that would be unlikely. The trustee reported the vote to the International, which on March 22 ordered him to dissolve Local 617, effective March 24. The International divided Local 617's signatory employers into five groups "along craft lines," and assigned each group to a sister local. As the Employer was not a signatory, the International left the unit to the discretion of the trustee, who assigned it to Local 701. About 250 employees, including those in the unit, became newly represented by Local 701, raising Local 701's membership to about 1600. The APA Trucking employees, despite their expression of their wish to become representees of Local 701, were assigned to Local 560.

By letter dated April 3, counsel for Locals 617 and 701 notified the Employer that Local 617 had been dissolved and that the unit had been assigned to Local 701. In that letter and other later communications, Local 701 demanded bargaining. By letters dated April 7 and April 20, the Employer first questioned its duty to bargain with Local 701 and then withdrew recognition.

As noted, the trustee of Local 617, who remains in charge of it as he winds it down, ¹ is also the Secretary-Treasurer of Local 701. Local 701 has assigned its vice-president to deal with the Employer. Locals 617 and 701 have substantially similar bylaws and dues structures. Local 701 did not charge current members of Local 617 a new initiation fee, and current members of Local 617 have become full fledged members of Local 701. Both locals historically bargained similar collective-bargaining agreements, patterned after the International's Master Freight Agreement. The offices of Local 617 remain open, and they house the Local 617 Welfare and Pension Fund, whose Board of Trustees continues unchanged. Employers signatory to contracts with Local 617 continue to contribute to the Fund. At the time of its dissolution,

 $^{^{1}}$ He will file reports with the Department of Labor and the IRS, and cause an audit by a CPA.

Local 617 apparently had negative cash assets. Its remaining assets, office furniture, equipment and the like, have been divided among the five locals that acquired Local 617's members.

ACTION

We concluded that complaint should issue, absent settlement, alleging that the Employer's withdrawal of recognition violated Section 8(a)(5).

1. Due Process

In NLRB v. Financial Institution Employees of America (Seattle-First National Bank), 475 U.S. 192 (1986) (Seattle-First), the Supreme Court held that the Board exceeded its authority by maintaining a rule requiring that all unit employees, including those who were not union members, be given the opportunity to vote in an affiliation election. While the Court noted that it was not passing on the propriety of the Board's due process requirement, 2 it also indicated that in the absence of changes in the representative "sufficiently dramatic" to raise a question concerning representation, the Board lacked authority to interfere at all with a union's decision to affiliate. 3 The Court stated:

If these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representative election. ... Otherwise, the statute gives the Board no authority to interfere in the union's affairs.⁴

On a number of occasions since <u>Seattle-First</u>, the Board has stated that it was unnecessary to decide whether the lack of "due process" raised a "question concerning representation" (QCR), the issue left open by the Supreme Court.⁵ Thus, in Western Commercial Transport, 288 NLRB

² 475 U.S. at 199, n.6.

 $^{^{3}}$ 475 U.S. at 206.

⁴ Id. at 206.

⁵ See for example <u>Sullivan Brothers Printers</u>, <u>Inc.</u>, 317 NLRB 561, 562 n.2 (1995), enf'd 99 F.3d 1217 (1st Cir. 1996) (because "due process" requirements were met, "we find it

214, 217 (1988), a post-Seattle-First amendment of certification case arising out of a merger which the Board characterized as an affiliation, 6 the Board significantly moved in the direction of abandoning the due process requirement altogether. The Board held that once a QCR is raised because of a lack of continuity, "an affiliation vote cannot be used as a substitute for a representation proceeding before the Board," overruling Quemetco, 226 NLRB 1398 (1976), to the extent that it held that an amendment to certification can be granted despite a lack of evidence of continuity of representative, where the employees had unanimously voted to affiliate. 288 NLRB at 217, 218, n.13. Thus, the expression of employee sentiment is no longer paramount and, in reality, after Western Commercial Transport the underlying rationale for employee member voting and due process no longer exists.

In recent cases, the General Counsel has taken the position that in union merger and affiliation situations, ⁷ the Board should no longer consider due process but only whether there is substantial continuity in the bargaining

unnecessary to determine whether, in view of the Supreme Court's opinion in Seattle-First, the Board lacks authority to impose due process requirements"); Paragon Paint & Varnish Corp., 317 NLRB 747, 748 (1995), enf'd 155 LRRM 2576 (D.C. Cir. 1996); May Department Stores Co., 289 NLRB 661, 665 n.16 (1988), enf'd 897 F.2d 221 (7th Cir. 1990); Hammond Publishers, Inc., 286 NLRB 49, 50 n. 8 (1987) (since both factors were met, did not have to reach the issue not reached in Seattle-First of "whether both continuity of representation and due process must be satisfied in all affiliation cases").

⁶ In <u>Seattle-First</u> the Supreme Court noted that the same standards are used in examining affiliations in the context of both petitions to amend certifications and in cases involving an employer's refusal to bargain, 475 U.S. at 200, n.8.

⁷ Although <u>Seattle-First</u> dealt with an affiliation of one union with another, the Board applies the same standards to mergers as to affiliations. <u>F.W. Woolworth Co.</u>, 285 NLRB 854 (1987), enf'd 892 F.2d 1041 (4th Cir. 1989) (table). Accord: <u>Hammond Publishers</u>, <u>Inc.</u>, 286 NLRB 49, 52-53 (1987) (AC petition).

representative.⁸ In those cases, we are arguing that if there is substantial continuity, there is no question concerning representation and the Board need not examine whether minimal due process was satisfied.

In Mike Basil Chevrolet, 331 NLRB No. 137 (August 16, 2000), a recent decision involving an amendment of certification, the Board found sufficient continuity and due process. We recognize that about one year earlier, the Board had remanded the matter to the Regional Director for findings on due process prior to reviewing the Regional Director's sole finding of insufficient continuity of representation. In its remand, the Board did not specifically state that due process was a necessary condition prior to granting an AC petition, but was unwilling to decide the case without analyzing the element of due process. Until the Board specifically addresses this issue, it continues to be the position of the General Counsel that the Board should no longer consider due process in merger and affiliation cases. Of course, where the evidence indicates unions have met due process standards under extant Board law, that evidence should be presented in litigation.

Although the Board has never required that an affiliation or merger vote be conducted in the same manner as a Board election, ⁹ it has generally required that due process safeguards include notice of the election to all members, an adequate opportunity for members to discuss the election, and reasonable precautions to maintain ballot secrecy. ¹⁰ The important considerations are whether there

Avante at Boca Raton, Cases 12-CA-18860 et al., Advice Memorandum dated December 18, 1998 (case pending before the Board on exceptions to JD(ATL)-75-98); E.I. Dupont, Case 33-CA-13201, Advice Memorandum dated February 23, 2000; and Allied Mechanical Services, Cases 7-CA-40907 et al., Advice Memorandum dated March 31, 2000 (case pending before the Board on exceptions to JD-14-00).

⁹ See, e.g., Insulfab Plastics, Inc., 274 NLRB 817, 822
(1985), enfd. 789 F.2d 961 (1st Cir. 1986); Aurelia Osborn
Fox Memorial Hospital, 247 NLRB 356 (1980); Bear Archery,
223 NLRB 1169, 1171 (1976), enf. denied 587 F.2d 812 (6th
Cir. 1977).

 $[\]frac{10}{10}$ Seattle-First National Bank, above, at 199, citing Newspapers, Inc., 210 NLRB 8, 9 (1974), enfd. 515 F.2d 334 (5th Cir. 1975).

was sufficient opportunity for discussion prior to the $vote^{11}$ and whether the voting was conducted in an orderly fashion and in an atmosphere free from restraint or coercion. 12 It is not necessary to establish that a majority of members, as opposed to a majority of those voting, approved the change. 13 Finally, the employer refusing to bargain has the burden of establishing that the procedures were so irregular as to invalidate the election. 14

In the instant case, we agree with the Region that the procedure used to effectuate the merger of Local 617 into Local 701 was conducted without adequate due process safeguards applying the above principles. Union members were not given advance notice that a vote would take place, and when the vote did take place, it was by a show of hands. Further, the International denied the wishes of a majority of those present, the APA Trucking employees, to transfer their membership to Local 701. However, despite this lack of due process, the Region should argue consistent with our position in Avante, E.I. Dupont, and Allied Mechanical, above, that since there is substantial continuity between Local 617 and Local 701, as discussed below, the lack of due process is not relevant.

2. Continuity

In <u>Western Commercial Transport</u>, the Board explained that in <u>determining whether a "question concerning</u> representation" exists because of lack of continuity, the Board seeks to determine whether the changes are so great that a new organization has come into being and should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance. The continuity requirement thus ensures that no one can substitute an entirely different representative in disregard of the established mechanisms for making such

¹¹ State Bank of India, 262 NLRB 1108 (1982).

¹² Bear Archery, above, at 1171.

¹³ <u>William B. Tanner Co.</u>, 212 NLRB 566, 567 (1974), enf. denied per curiam 517 F.2d 982 (6th Cir. 1975); <u>Aurelia</u> Osborn Fox Memorial Hospital, *above*, at 359.

 $^{^{14}}$ News/Sun-Sentinel Co., 290 NLRB at 1175; Insulfab Plastics, above, at 821.

change. The Board further explained that the Court's Seattle-First decision reiterated the long understood role of the Board regarding union affiliations. The Board noted that the Court stated that changed circumstances, such as organizational and structural changes may alter the relationship between the union and the employees it represents, and this may raise the question of whether the affiliated union enjoys continued majority support. Further, many purely internal organizational and structural changes may operate to alter a union's identity, such as changes in the constitution and bylaws, or reorganization of financial obligations. The Board concluded it was "clear ... that the Court did not intend to preclude the Board from inquiring into continuity of representative when there have been dramatic changes in the organization or structure of a bargaining representative."15

As noted, the general test for substantial continuity of representation is whether the affiliation or merger produced a change that is "sufficiently dramatic to alter the union's identity. . . ."16 In each case, continuity is determined by a factual comparison between the "old" and "new" unions. To determine whether a merger or affiliation has altered the essential nature of a bargaining representative as it affects the employees, the Board examines several factors, and no one factor is crucial.¹⁷

In <u>Service America Corp.</u>, ¹⁸ the Board noted in determining continuity: (1) continued leadership responsibilities by the existing union officials; (2) perpetuation of membership rights and duties, such as membership eligibility and dues structure; (3) continuation of the manner in which contract negotiations, administration and grievance processing are effectuated; and (4) the preservation of the certified union's physical facilities, books, and assets. The Board has also applied this test to the merger of two locals of the same International. ¹⁹

16 May Department Store Co., <u>above</u>, 289 NLRB at 665.

¹⁵ 288 at 218.

¹⁷ Central Washington Hospital, 303 NLRB 404 (1991).

¹⁸ 307 NLRB 57 (1992).

¹⁹ *Id.* at 59.

In <u>Sullivan Bros. Printers</u>, above, 317 NLRB at 563-65, Locals 109C and 139B of the Graphic Communications International Union merged into Local 600. Local 109C had 40 members, Local 139B had 10, and Local 600M had 700. The Board held that the mergers did not deprive former Locals 109C and 139B of their representative statuses, and that the employer unlawfully refused to bargain. The Board reasoned that although there was discontinuity in leadership, other factors favoring continuity were determinative (i.e., Local 600 assumed the collective-bargaining agreement; no initiation fees, same constitution and bylaws, sufficient local autonomy and right to hold office in new local). The Board stated:

[T]he paramount policy of the Act [is to] encourag[e] stable bargaining relationships to preserve industrial peace... [T]he Board will interject itself only in the most limited of circumstances involving such internal changes... [C]hange is the natural consequence of ordinary, valid reasons for affiliations and mergers, such as increased financial support and bargaining power... [M]ergers of sister locals have less inherent potential for significant change than other types of changes... Id. at 562, 563.

Most recently, in Mike Basil Chevrolet, above, the Board held that the affiliation of an independent union representing 28 members with an Auto Workers local of some 1300, did not destroy continuity. Citing with approval Western Commercial Transport, the Board reasoned that "the significant factor is whether there is an identity change as a result of the affiliation." 331 NLRB No. 137, slip op. at 1. In finding continuity, the Board noted that although there will be some loss of autonomy, employees "will continue to have a voice in the administration of their collective-bargaining representative after affiliation" through representatives on the joint council; employee members of the independent will be able to participate "in the fundamental decisions on labor management relations at their workplace in much the same manner after affiliation as the did before" (i.e., through the unit-shop committee); unit employees must ratify collective-bargaining agreements; members must authorize a strike; and the constitution and bylaws of the UAW place "'the highest authority'" for the handling of local matters in the hands of the membership of particular units." Id., slip op. at 2. Finally, although there would be a dues increase, the Board noted that there was not a significant change in dues structure.

Here, as in the above cited cases, there is continuity of representation. Locals 617 and 701 are sister locals of the same International and of approximately equal size. They have substantially similar bylaws and dues structures. Local 701 did not charge current members of Local 617 a new initiation fee, and current members of Local 617 have become full fledged members of Local 701. Both locals bargain similar collective-bargaining agreements, patterned after the International's Master Freight Agreement. trustee of Local 617, who remains in charge of it as it winds down, is also the Secretary-Treasurer of Local 701. At the time of its dissolution, Local 617 apparently had no cash, and its remaining assets, office furniture, equipment and the like, have been divided among the five locals that acquired Local 617's members. However, the Local 617 Welfare and Pension fund is still functioning, and Local 617 signatories continue to pay into it. It appears that Local 701 is administering some of Local 617's contracts. There is no reason to believe that at locations where Local 617 had an established bargaining relationship, the assignment of those locations to Local 701 has caused stewards to be replaced. On these facts, we conclude that the requisite continuity exists.

As the assignment of employees represented by Local 617 to Local 701 for representation has not interrupted the continuity of representation, and notwithstanding the lack of due process, we conclude that Complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by refusing to bargain and withdrawing recognition from the Union.

B.J.K.